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IN THE

Supreme Court of the United States

October Term, 1945

A. M. ANDERSON, Receiver of National Bank of Kentucky, Louisville, Kentucky,

Petitioner,

vs.

IRVIN YUNGKAU, Executor of the Estate of Albert Yungkau, Deceased, et al.,

Respondents.

BRIEF FOR RESPONDENT, HENRY G. SANDIFER, ON PETITION FOR WRIT OF CERTIORARI.

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IRVIN YUNGKAU, Executor of the Estate of Albert Yungkau, Deceased; H. E. FRANZ, Executor of the Estate of William R. Gilpin, Deceased; LUCY LOGAN MASSIE, Executrix of the Estate of William K. Massie, Deceased; BEN WILLIAMSON, Jr. and DAVID GEIGER, Co-Executors of the Estate of Ben Williamson, Deceased; WATT M. PRICHARD and CHARLES V. KITCHEN, Co-Executors of the Estate of James H. Kitchen, Deceased; CATHERINE C. KITCHEN, Executrix of the Estate of John W. Kitchen, Deceased; HENRY G. SANDIFER, Executor of the Estate of Alexander B. Massey, Deceased,

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BRIEF FOR RESPONDENT, HENRY G. SANDIFER, ON PETITION FOR WRIT OF CERTIORARI.

STATEMENT

For the convenience of the Court we shall follow the topics in petitioner's brief and in the order they there appear.

The "summary statement" in petitioner's brief states the situation fairly well. We do not agree that the District Court failed to relieve against a "miscarriage of justice" by enforcing a limitation of Rule 25 (a), the same being in all particulars like a statute of limitations as to the bringing of an original action.

OPINION BELOW

We invite a careful reading of these opinions.

JURISDICTION.

We do not question this Court's jurisdiction to review this cause, if it is of opinion it should do so.

THE QUESTIONS PRESENTED

The petitioner has stated the question he desires to present to the Court. Our position is that Rule 25 (a) takes the place of Sect. 778 Jud. Code, provides the same limitation as to the time within which an action may be revived and merely reaffirms the said Code Section; that Rule 6 (b) was not intended nor does it extend the time that the Court may revive an action; that Rule 6 (b) merely gives relief as to an excusable delay, as to an act to be done by a party to a suit, but does not enlarge the time given the Court to act, where action by the Court is required, and does not control the specific provisions of Rule 25 (a).

REASONS RELIED ON FOR WRIT OF CERTIORARI.

Petitioner states "the decision of the Court is without precedent". There are decisions hereinafter mentioned where Rule 25 (a) has been enforced after consideration of Rule 6 (b) and other decisions holding the limitations of other Rules are not affected by Rule 6 (b), although not excepted in that rule. About eight years have elapsed since the Rules of Civil Procedure were adopted, and as Petitioner states, this is the first time Rule 25 (a) has been questioned, as not fixing the same limitation as to revivor of actions as existed prior thereto in Section 778, Jud. Code.

The Advisory Committee has not interpreted Rule 25 (a) or Rule 6 (b) as the petitioner, but merely intends to make clear that Rule 25 (a) provides a clear and *fixed* limitation of the time *within which an action may be revived.* It is only after eight years that the Advisory Committee finds it desirable to so act in order to carry out in a clearer manner its original intention.

SPECIFICATIONS OF ERROR

We affirm that the Courts below did not err in either of the two ways mentioned by the petitioner.

ARGUMENT

The petitioner states this is a case this Court should review because "it involves a conflict between the Rules of Federal Procedure which has been resolved differently by inferior Courts." The petitioner has not pointed out in his brief, or can he, a single case wherein Rule 25 (a) was held to be modified by the provisions of Rule 6 (b).

It is then stated the question is of general interest and concern. About eight years have passed since the Rules of Civil Procedure were drawn and put in force and this is the first time an attempt has been made to modify Rule 25 (a) by the provisions of Rule 6 (b), except, perhaps in *Winkelman* v. *General Motors Corporation*, 30 F. Supp. 112, wherein the Court applied Rule 25 (a) and Section 778 Judicial Code and found the action must be revived *within* two years of the defendant's death. Therefore the only time this question has been raised by one, other than the petitioner herein, in a lower Court in eight years, it was decided contra to the petitioner's contention. We therefore say the question herein is not of general interest and if the Advisory Committee acts, it will not be possible to plausibly raise it in the future. The attempt to use Rule 6 (b) in the *Winkelman* v. *General Motors Corporation* case, and the like attempt in this case, has no doubt caused the Advisory Committee to propose to make clear its original intent that Rule 6 (b) in no way affected Rule 25 (a) and the time therein fixed, as is stated at page 8 of petitioner's brief. And the Committee does not propose to leave the question as to the effect of Rule 6 (b) on Rule 25 (a) open, although so far no case has been decided in which Rule 25 (a) has been modified by Rule 6 (b).

The Judicial Code fixed two years in which an action might be revived against an administrator or executor that they might know when they had repose. It was as definite a statute of limitation as any other like statute enacted to bring about repose. To permit a revivor after two, or three or ten years because of "excusable" neglect would be to do away with all limitation and all repose.

Rule 25 (a) provides:

> "If a party dies and the claim is not thereby extinguished, *the Court within two years* after the death may order substitution of the proper parties."

The Court by this rule is permitted, as by Section 778, Jud. Code, to act within two years after the parties death. Thereafter by the Section of the Code and by the Rule, last mentioned, *the Court does not have* jurisdiction to revive the action against the executor or administrator. The Rule recognizes this and then goes on to provide:

> "If substitution is not so made, the action shall be dismissed as to the deceased party".

The Court has lost jurisdiction of the cause, as to the deceased party, and the language last quoted orders the cause then be dismissed as to him. The word "shall", is obviously used in the sense of "must", not "may". To permit the action to remain unrevived would serve no purpose. The time within which substitution of parties may be made, having elapsed, the action is dead, and to read the last quoted part of Rule 25 (a) as follows:

> "If substitution is not so made, the action "*may*" be dismissed as to the deceased party".

merely leaves the matter of letting a dead action remain on the Court's docket, or striking it off, to the discretion of the Court. Obviously the Rule intends for the action to be dismissed.

We ask the Court to read that part of the Court of Appeals opinion at page 30 of the Record where the only authorities upon the question herein involved are reviewed and commented upon. We particularly invite the

Court's attention to the comments upon *Wallace* v. *United States*, 142 F. (2d) 240, 244 (C. C. A. 2) where Rule 6 (b) was found not to permit the Court to enlarge the six month period for a motion to relieve from a judgment provided in Rule 60 (b).

The revivor within two years is an action *to be taken by the Court.* The provisions of Rule 6 (b) are obviously to provide against excusable neglects *of parties to do certain acts.* Its provisions are very general. The language of Sect. 778 Jud. Code, restated in Rule 25 (a), could not be more specific. As stated by the Court of Appeals of the District of Columbia in *Burke* v. *Canfield*, 111 F. (2d) 526, 527, where Rule 6 (b) was claimed to modify Rule 73 (g), the words of limitation must have been used advisedly, and it is the general rule that general language must yield to particular, where both apply to the case at hand and the plain intent is not defeated by such construction. That Court then disapproved *Ainsworth* v. *Gill Glass & Fixture Co.* 104 F. (2d) 83, for that reason and cites *Bailey* v. *Allen E. Walker*, 55 App. D. C. 74, 2 F. (2d), 123.

Rule 6 (b) has been used (with the claim of excusable delay) in connection with Rules 25 (a), 60 (b) and 73 (a) and in each instance, except in *Ainsworth* v. *Gill, supra,* the Courts have uniformly held the general language of Rule 6 (b) did not apply to change specific language in the other Rules mentioned. It would appear therefore, that the proposed action of the Advisory Committee in changing Rule 6 (b) to conform to Sect. 778 Jud. Code, and the evident original intent of the Committee, is hardly necessary, except to make things so clear, questions such as petitioner has raised can no longer be presented to the courts. The Advisory Committee proposes to give

clearer meaning to Rule 25 (a) by excepting it from the operation of Rule 6 (b) and therefore shows it never "intended to relieve against the injustice and the hardship of an unyielding application of the executioner's knife", etc., as stated at page 9 of petitioner's brief, but always had in mind, and now has in mind, that administrators and executors should be given repose as to unrevived actions after two years, and not be compelled to hold estates open indefinitely to see if attempted revival of actions are to take place. Such defendants are entitled to repose after a limited period the same as one who may be sued because of an automobile accident. The Advisory Committee advise affirming what the Courts have held by making clear the meaning of Rule 6 (b). We know of no other litigant than the petitioner who would benefit from this Court reviewing this cause.

CONCLUSION

The Court of Appeals has properly determined the question herein and this Court can hardly be called upon to review all decisions of Courts of Appeals on all questions never specifically brought before this Court, and the writ of certiorari should not be granted.

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